NO. 16385

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELSINORE C. MACHRIS GILLILAND, also known as
ELSINORE MACHRIS GILLILAND,

Appellant,

vs

FAYE LYONS,

Appellee.

APPELLEE'S REPLY BRIEF

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STATEMENT OF THE CASE

This is an appeal from an Order granting a new trial as to Plaintiff's second cause of action only in the above entitled case. The same Order denied a new trial as to causes of action one and three.

Cause of action number one was for slander. The court found that the defendant did not utter the alleged slanders and so did not reach the issue of truth which had been pleaded. (R.T. 48-49.)

Cause of action number three was for libel. The court found that defendant was not responsible for the libel published in the Riverside Daily Enterprise, so did not reach the issue

of truth which had been pleaded. (R.T. 52.)

Cause of action number two was for libel. Truth was not affirmatively pleaded. (R.T. 51. Finding IX.) Falsity had been pleaded by Plaintiff. The learned District Judge omitted a finding as to truth or falsity by passing over the point and finding for the Defendant on the issue of privilege. (R.T. 51. Finding IX.)

Plaintiff, on its motion for new trial, objected to the finding of privilege, i.e., Findings VII and VIII, on insufficiency of the evidence and as to Finding IX on the grounds that it constituted an erroneous avoidance of the duty to make a necessary finding essential to the establishment of justice in this case. (R.T. 54-55.)

The Order Granting a New Trial as to the second cause of action and denying it as to causes of action one and three was made on general grounds, i.e., no grounds were stated. Appellant bases its major attack on the grounds that the order specified grounds not contained in the motion. The Order is silent as to grounds. (R.T. 79.) Appellant finds the "specified grounds?" by reading and ignoring a section of the Civil Code, 47-2(3) and two citations of the Supreme Court of California which were inserted in a parenthesis after the Order. (R.T. 79.)

The main issue contended for by Appellant and opposed by Appellee is: Was the Order made on general grounds or were [illegible] (Fig. [illegible])

[illegible] (Fig. [illegible])

[illegible]

[illegible] (Fig. [illegible])

[illegible]

[illegible]

specified grounds set forth in the Order.

Appellant presents three points for argument:

(1) That the District Court had no jurisdiction to grant the motion on the grounds specified.

(2) If it did have jurisdiction it was a gross and prejudicial abuse of discretion to do so.

(3) If the court granted a new trial on ground of insufficiency of the evidence to support finding of privilege (Finding VII) it was a gross abuse of discretion to do so.

Appellee will answer the points seriatim.

Point 1: Did the District Court have jurisdiction to grant the motion for new trial?

Appellant's argument falls with the fall of its major premise, i.e., that the Order was granted on a specified ground. It was not. (R.T. 79.)

The court granted the motion as to the second cause of action without specifying any grounds. (R.T. 79.)

The court denied the motion as to the first and second causes of action without specifying any grounds. (R.T. 79.)

The parenthetical citation of a Code section and two California cases cannot legally or logically be expanded into a specification of grounds. Whether the citations refer to the granting of the motion as to the second cause of action or the denial of the motion as to the first and third causes of

action is a matter of conjecture and surmise although grammatical nicety indicates that since the first part of the compound sentence is separated from the second by both a comma and a conjunction, the parenthetical citations refer only to the next proceeding portion of the compound sentence and not to the first or more remote portion thereof. If it be held that the citations apply to both then appellant's argument falls by reason that it must stand for both the granting of the motion and the refusing to grant the motion as to the other two causes of action, which conflicts with appellant's legalistic assumption that the pages printed in the brief refer exclusively to a single legal point. This position is neither tenable nor true. Several matters are involved. The existence of three will disprove the assertion that there is only one as completely as a dozen.

(1) The whole subject of privilege is involved in the Code Section. The following two points at least are discussed in Davis v. Hearst, p. 195.

(2) In the absence of a plea of mitigation evidence of truth is properly excluded.

(3) When a plea in mitigation (privilege) is made only so much of the truth as the defendant knew at that time can avail him.

The first point is not involved in the case because Davis v. Hearst lacked a plea of mitigation or privilege, while in the instant case privilege was pleaded.

The second point may well be the point on which the court felt he erred, i.e., that he had taken into consideration everything produced at the trial to establish privilege when it was only so much as defendant knew at the time of publication which was available for consideration, to-wit: the Blanch Lampert Statement and certain information her husband had given her before they were married. (R.T. 96-101.)

This point was raised in the motion, in the memo of points and authorities and in the argument.

Appellant's citations to the effect that errors in the admission of evidence cannot be raised for the first time on appeal are proper statements of law but have no application. Appellee raised them before the trial court on her motion for a new trial and only defends on this appeal.

District Court had Jurisdiction

In giving the grounds for a motion for a new trial, no such particularity is required as is appropriate in a pleading.

Appellee's principal objections were directed to evidence, i.e., that certain named findings were not supported by the evidence. By evidence "legal evidence" was intended and the attack in argument was that there was not sufficient legal evidence to justify the finding. As a matter of law, evidence learned after publication cannot be used to support a plea of privilege. Davis v. Hearst, 160 Cal. 143, at 195. If there was not sufficient legal evidence, judged on this standard, to

support the finding, it was wholly within the learned judge's jurisdiction to recognize the fact and order a new trial. If he had erroneously considered evidence admissible on the other causes of action but unavailable to support a finding of "privilege" he could correct his error by ordering a new trial. In general when a trial court errs he has jurisdiction to correct his error on the motion for a new trial. The insufficiency of the "legal evidence" was a "ground" stated in the motion and the court had jurisdiction to consider that ground and all matters reasonbly related thereto. To hold otherwise would be to initiate a new rule to the effect that legalisms and technicalities should restrict rather than that latitude should expand the powers of a trial court to correct his own errors on a motion for a new trial.

Our jurisprudence would suffer indeed if we supplanted the word "law" for the word "legalisms" so as to pervert the old maxim "Let law prevail though the heavens fall," into "Let Legalisms prevail though the heavens fall."

Summary of Point 1

(1) Appellant states that the Order on Motion for a New Trial (R. T. 79) was made on specified grounds. Appellee states that it was not. A reading of the ten lines which comprise the Order at page 79 of the transcript will be more convincing than an avalanche of words.

(2) Appellant contends that when an order is stated in

general terms but citations of authorities are parenthetically appended that a party may read the citations and speculate from them what the court was thinking about when he made the decision and then assert that the general words of the Order itself are restricted to a single ground.

(3) Appellant contends that in considering a Motion for a New Trial based upon insufficiency of the evidence to support a finding, the court may not reconsider its decision or change its mind.

(4) Appellant contends that the rule to the effect that complaint cannot be made in the U.S. Court of Appeals to the introduction of evidence unobjected to in the U.S. District Court must also be applied in the U.S. District Court where the objection was made in this case.

One may well inquire, "Where can the objection be made?" or "Can it be made at all?"

The mere statement of the contentions of the Appellant as to Point 1 constitute their complete refutation.

Point 2: Abuse of Discretion.

Appellant's second point is, "if the court did have jurisdiction to grant said motion on the ground stated, it was a gross and prejudicial abuse of discretion." Since no ground was specified in the Order granting the motion, Appellant's point falls with the elimination of the qualification "on the ground stated . . ." From the heading, however, it is clear

that Appellant is still contending that counsel's own conclusion as to what the court was thinking about, gleaned from counsel's own speculation and surmise upon reading some citations, has become not only the sole and exclusive ground for the granting of the Order but has also become the "specified ground."

This must have been accomplished by "miracle" or "magic" since neither logic nor law are presented to show that the metamorphose of the Order was accomplished by any Human or Natural means. Nor does the Order as it appears in the Transcript suggest the asserted change. Doubtless esoteric knowledge is required to discern it and we, alas, do not belong to the elect. In passing it might be pleasant to reflect on how gratifying it would have been in the early practice of law if one could have reversed a factual judgment against one's client by merely meditating that the judgment should have gone the other way.

When one wants a thing to be true very greatly, little by way of substantiation is required to convince one of its truth.

Appellant has wished to find an error so greatly that she has convinced herself that she has done so.

This point falls on the same error as the first. The asserted proposition that the general words of the Order has been changed by Appellant's ratiocination is just not true.

The Order was granted on general grounds. On general grounds it must survive or fall.

Point 3.

This point needs no long discussion. Appellant contends that: "The Evidence Conclusively Shows There Was No Malice." The evidence quoted in Appellant's Opening Brief, page 45, constitute only the self serving exculpatory phrases of the accused and Appellant's position that this constitutes "conclusive evidence" is a massive absurdity.

The trial court was completely within its rights to have disbelieved her.

Evidence of malice, a subjective event, is best proved by conduct rather than by words.

In the Bhahagavad Gita, a part of the great Hindue epic Maha Bharata, 27 ways are given whereby one may know the "good" from the "evil" man. All apply to his observable conduct and none to his words.

In the Sermon on the Mount Christ twice warns against hypocrites and leaves the maxim "By their fruits ye shall know them." Matt. 7:20.

The Apostles James and John amplify with examples such as "Faith without works is dead" (James 2:20) and "Whosoever saith I know him and doeth not his works is a liar and the truth is not in him." 1 John 2:4.

Justin Martyr in his First Apology to Antoninus Pius writes:

> "Justice requires that you inquire into the life

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] Antiquities [illegible]

[illegible]

> both of the man who confesses and of him who denies that by his deeds it may be clear what kind of man he is."

Descartes, in his Essay on the Method of Rightly Conducting the Reasoning, states (Part III, par. 2):

> ". . . it seemed to me most expedient to bring my conduct into harmony with the ideas of those with whom I would have to live; and that in order to ascertain that these were their real opinions I should observe what they did rather than what they said."

The famous Judgment of Solomon (I Kings 3:16-28) was accomplished by a ruse in which the liar was entrapped by conduct in conflict with her plea.

Our poets and writers have so copiously treated this theme that any exhaustive statement would surpass the scholarship of the writer and exceed the necessities of a brief.

We might reflect that it was by provoking the king into conduct by the "play" that Hamlet revealed the "conscience of the King," and it was by contrasting the deeds of Cordelia with the words of her hypocritical and ungrateful sisters that Shakespear enobled the heroine of the Tragedy of King Lear.

The considered wisdom of the ages, of which a few examples have been given, has been recognized in California

Jurisprudence, which is applicable in this cause.

Subjective events such as "intent" or "malice" are usually not susceptible of direct proof but may be ascertained from subsequent conduct and speech.

See Law note: 23 Cal. Jur. 2d §80, p. 202.

Tench v. McMeekan, 17 Cal. App. 14.

Holiday v. Tolosano, 39 Cal. App. 151-53.

While "intent" and not "malice" were involved, "malice" is included in the general term "intent" as constituting a particular type of intent, i. e., an evil one. The rules of evidence as to "intent" in general apply to "malice" as well.

Let us now examine a few things that Appellant did, in contrast to what she said.

(1) She swore to the truth of accusations of adultery with particularity as to time and place on the sole evidentiary basis of the Blanch Lampert Statement. The statement made no charge of adultery by Appellee, conflicted with the accusation as to time and place and did not contain data from which adultery could be reasonably inferred.

(2) She made no effort to serve Appellee although she knew her address. This is only compatible with the inference that it was made to hurt Appellee by urging an unsubstantiated vilification which she had no intention of proving.

(3) She made no attempt to secure substituted service as provided in Sec. 1019, C. C. P. This shows that her

vilification was so untrue that she knew from the start it was false, that it couldn't be proved but that it would hurt her husband and Appellee.

(4) She made no attempt to prove adultery at the trial. Again we have the complete abandonment of the accusation after its purpose, i. e., to vilify and injure Appellee, had been accomplished.

(5) Only when suit for libel and an attack was made upon her purse did she scour the nation to seek for phases in Appellee's life from childhood onward so as to find something to justify her slur.

(6) She admitted that the defamatory matter was untrue as a matter of law by choosing to omit a plea of truth.

(7) She pretended injured innocence by self serving interruptions in the Blanch Lampert Statement. (P. 4 thereof, Exhibit 5.) Note how Blanch Lampert takes the suggestion and obliges with an assist.

(8) After suit when her investigation, nationwide in scope, failed to reveal adultery she sought to perpetuate her slur by the protection of court procedure. A noble character admits a wrong and seeks to make a reparation. When the opposite conduct is shown the conclusion is justified that an opposite character dictated the conduct and that malice, and not virtue, supplied the motive.

(9) And now in this very proceeding, when the terror of

a monetary loss again enters her mind, she again seeks to perpetuate her unproven slur by fighting to prevent the pitiful attempt of a mother to recapture a few shreds of reputation for the consolation of her little son.

Appellant's conduct in doing the most complete damage to another woman which is possible, in our present state of culture, while protesting that she bore her no malice, reminds one of Lewis Carrol's famous poem entitled "The Walrus and the Carpenter," and particularly that part where the Walrus was about to eat his trusting little friends, the Oysters:

"I weep for you, the Walrus said,
I deeply sympathize
With sighs and tears he sorted out
Those of a larger size
Holding his pocket handkerchief
Up to his streaming eyes."

Or perhaps the unsatisfactory assurance of the lover in Cynara might be nearer the subject:

"I have been true to Thee, Cynara,
In my fashion."

To paraphrase, Appellant Elsinore Gilliland might well have said, when she publicly accused Faye Lyons of adultery under circumstances she knew would result in nationwide publicity and in the greatest possible injury,

> "I am protecting your reputation, Faye
> In my fashion."

In dealing with malice Appellee prefers the guidance of the maxim "By their fruits ye shall know them" to that afforded by the self serving declaration of the Appellant that "she bore no malice whatever."

Malice Inferred

1. Malice is inferred from the publication. C.C.C. Sec. 48, Davis v. Hearst (supra).

2. A person intends the ordinary consequences of his voluntary acts. C.C.P. 1963:3.

3. The following presumptions and no others are deemed conclusive: a malicious and guilty intent from the deliberate commission of an unlawful act done for the purpose of injuring another * * * C.C.P. 1962:1.

4. A true or false defamation is a crime. Sec. 248, 249, California Penal Code. Truth plus justification is a complete defense. Sec. 251, California Penal Code.

The alleged libel was published November 26, 1955. If Appellant can legally prevail she must affirmatively prove conditional privilege as of that date. The only justification in evidence and the sole legally relevant evidence against Faye Lyons is the Blanch Lampert Statement. If that statement justifies specific charges of adultery by Faye Lyons at specified times and in specified places, Appellant will have sustained

the burden of proof as to privilege. If that statement does not justify specific charges of adultery by Faye Lyons at specific times and in specific places, defendant has not proved privilege and the decision is erroneous.

A Finding of Falsity was Essential

The court erred in failing to find that the defamatory matter was false. This was specifically urged in the Motion for New Trial. (R.T. 55, Finding IX.)

Appellee pleaded the falsity of the defamatory matter.

Appellant failed to plead truth.

As a matter of law falsity stands admitted.

Falsity constitutes a material element of civil libel and requires a finding. None was made. This constituted error. The learned judge corrected by granting a new trial.

A finding against a material admission in a pleading is a ground for reversal.

Estate of Cover, 188 Cal. 133.

Faulkner v. Rondoni, 104 Cal. 140.

Romer v. Wehner, 61 Cal.App. 411.

Finding X is against a material admission and constituted ground for reversal. Appellee's right to a finding of falsity was not satisfied by a finding which leaves the matter in doubt. An honest woman and a woman of doubtful reputation are not the same thing.

"For every wrong there is a remedy." This maxim was

intoned by the juris-consults of ancient Rome, has been enshrined in the Pandects of the monumental Code of Justinian and has been rewritten as Section 3523 of the Civil Code of the State of California.

To falsely accuse a woman of adultery is a wrong. If it is done under conditions of privilege, the wrong is not removed. The legal remedy, however, has been seriously impaired. Like the owner of an outlawed note, the right remains, but the remedy is withheld. Since the reign of Theodosius II, matters of public policy have justified the withholding of the remedy, leaving the right unimpaired. Considerations of Public Policy also impelled the statutory doctrine of privilege, but only insofar as immunity of the libellant was concerned. Insofar as power still remains in a court to do justice and let right prevail, it is the obligation of the court to do it. If some of the value of reputation can be salvaged by a judicial finding of the falsity of the charge, a court cannot legally escape its obligation to Appellee by withholding this available form of relief. The learned District Court quickly corrected this error when it was pointed out by granting a new trial.

Conclusion

Because Appellant's legalistic arguments are without merit;

Because a trial court should be allowed to correct its revealed errors on motion for a new trial and should be given

latitude in which to do so;

Because a new trial is manifestly necessary to establish justice in this cause;

The Order granting a New Trial should be affirmed.

Respectfully submitted,

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